



DRBF *Forum*

Volume 23 Issue 4

DRBF Ends Year with New Global Initiatives

Partnerships with the World Bank and FIDIC strengthen commitment to Dispute Board process

The Dispute Resolution Board Foundation was founded with the mission to bring together providers and users of Dispute Boards with a focus on providing information, education and training. Despite a challenging year, the DRBF is pleased to announce two initiatives that demonstrate this mission in action.

The World Bank demonstrated their commitment to the Dispute Board process in 1995, when they made DBs mandatory for all bank financed projects over \$50 million. Most recently, the Bank has been taking concerted and decisive steps to strengthen prevention

and mitigation of gender-based violence (GBV), sexual exploitation, abuse and harassment in Bank financed operations. The DRBF fully supports this initiative, and has worked with the Bank to develop a mechanism whereby the Dispute Board, which is now mandated on all World Bank financed projects over \$20 million, will assist with the continuous monitoring and, if required, the handling of any alleged non-compliance with GBV-related obligations.

The DRBF and the World Bank have prepared a guidance note available on *continued on page 2*

Related stories:

“The World Bank Expands the Role of the Dispute Avoidance & Adjudication Board”
found on page 4

“Dispute Resolution Board Foundation selected to support FIDIC’s newly established certification body, FIDIC Credentialing Limited, with the launch of adjudicators’ expansion programme”
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the DRBF website which details the obligations of the parties and the role of the Dispute Board on such projects.

FIDIC, the International Federation of Consulting Engineers, is another leading industry voice supporting the use of Dispute Boards in their standard form contracts, used widely by the World Bank, other financing institutions, and project owners/employers worldwide. The DRBF recently signed a memorandum of agreement with FIDIC's certification body, FIDIC Credentialling Limited (FCL), to support FCL's adjudicators' programme. The goal is to increase the number of DB practitioners admitted to the FIDIC President's List.

Under the terms of the agreement, the DRBF will nominate Dispute Board experts to sit on the FCL's writing and examination committees for the new

adjudicator assessment program and provide continuing professional development training for the approved adjudicators on the FIDIC President's List. The first programs will begin in early 2021.

More details on these programs can be found in the following articles in this issue of the *Forum*.

The DRBF leadership would like to recognize the efforts of Peter Collie, Leo Grutters, Jim Perry and Geoff Smith for their leadership in guiding these initiatives on behalf of the DRBF.

Further gratitude goes to our senior members who have volunteered to participate in the writing and examination committees for the FIDIC accreditation programme.

DRBF Bylaws Article II: Purpose and Objectives

"...the Foundation is a voluntary organization created to provide information, education and training to entities and persons involved in the construction process having need of dispute prevention and resolution services and to create a clearing house for the bringing together of the providers and users of DB services. By so doing, it is the goal of the Foundation to assist in the prevention and resolution of disputes on construction projects."

President's Page

Dear Members, Dispute Board Users, and Friends and Supporters of the DRBF,

Welcome to the fourth edition of the Forum in 2020. I trust that you and your families are safely navigating your way through what has been a most difficult year for all of us no matter where in the world we live.

As I mentioned in our previous Forum, the DRBF has felt the financial impact of the pandemic with reduced membership, reduced sponsorships, and having to postpone or cancel our major conferences. Thankfully, prudent financial management over many years and assistance through the US job protection program has helped us withstand the loss of revenue.

Nevertheless, we have been able to rise to the challenges posed by the Covid-19 pandemic thanks to the dedication of our staff, who have worked tirelessly behind the scenes, and the commitment of our members across the world who freely give up their time to support a number of significant initiatives. We have managed to maintain most of our core services and even add new services, such as webinars and virtual conferences, in an effort to make our members and the DB community feel more connected than ever. There are many DRBF Board members and committee members working to connect with DB users, industry organizations and associations, and members to expand the effective use of DBs in their local communities as well as across borders.

The DRBF has just launched a newly revamped website and an initiative for the publication of Dispute Board themed papers. We are soon to roll out DB apprenticeship and mentorship schemes in Regions 1 and 2. We hope these programs will help those seeking to start out as a DB Practitioner overcome the “chicken-and-egg” dichotomy and secure their first appointment. This is a common question, and Region 3 tackled the topic in a recent webinar which can be viewed in the DRBF library.

I hope you enjoy the interesting news and articles in this edition of Forum, and I'm sure you will agree that it shows that the DRBF is the pre-eminent organisation for those committed to dispute avoidance and real time dispute resolution.

May I wish you all the best over the holiday season, and I look forward to your continued support of the DRBF.



Andrew “Andy” Griffiths



Andrew Griffiths
President
DRBF Executive
Board of
Directors

The World Bank Expands The Role of the Dispute Avoidance & Adjudication Board

By Geoffrey
Smith

Chair, DRBF
Bank Liaison
Committee

In February 2019, the World Bank signed a five-year licence agreement with FIDIC (the International Federation of Consulting Engineers), to use FIDIC contracts for Works projects financed by the Bank. In particular, the agreement covered the use of the 2017 Editions of FIDIC Red, Yellow and Silver Books (“FIDIC 2017”). This agreement superseded the previous agreement between the Bank and FIDIC with respect to the use of the Multilateral Development Bank Harmonised Edition of the FIDIC Conditions of Contract for Construction - the so-called “Pink Book” which was due to expire on 31 May 2019.

At the same time, the World Bank approached the DRBF with respect to the possible use of the Dispute Avoidance and Adjudication Board (“DAAB”) which is foreseen by the FIDIC 2017 contracts as a tool for encouraging compliance by contractors with the Bank’s policies for preventing gender-based violence (GBV). The Bank’s idea was that a suspected case of non-compliance with GBV-related contractual procedures could be referred to the DAAB for a decision, which could then trigger a suspension of the Contractor’s eligibility for future projects financed by the Bank, if the non-compliance was confirmed. This mechanism would be much quicker than the Bank’s established method.

From March 2019, Geoff Smith, Chair of

DRBF’s Bank Liaison Committee, and Aisha Nadar, FIDIC Executive Board Member and DRBF Representative for Sweden, have worked with the Bank in developing the mechanism. Enzo de Laurentiis, Chief Procurement Officer for the World Bank, presented the program to DB practitioners and users at the DRBF’s conference in Stockholm in October 2019.

Initially, the Bank’s Standard Procurement Documents (“SPD”) were adapted to suit the use of FIDIC 2017. Revised documents for use with the FIDIC Red Book were published in June 2019 to coincide with the expiry of the agreement to use the Pink Book. Similar versions of the SPD for use with the Yellow Book and Silver Book were published in December 2019 and July 2020, respectively.

To overcome some of the problems encountered with respect to the implementation of the Dispute Board provisions in earlier versions of FIDIC contracts, and to encourage the establishment of the DAAB, the new SPD¹ require:

- Contract to include the names of 6 potential DAAB members, 3 named by Employer and 3 named by Contractor
- Contract to include a Provisional Sum to cover the Employer’s share of DAAB costs, financed by the Bank

¹ The African Development Bank and the Islamic Development Bank have recently included similar provisions in their SPD for use with FIDIC 2017.

- DAAB to be appointed before the Commencement Date (as a Condition Precedent)
- Three member DAAB for projects exceeding USD 50 million, one member for projects less than USD 20 million, and for projects between USD 20 million and USD 50 million, Parties to agree on number of members
- Expanded qualification requirements for DAAB members
- DAAB members not to be same nationality as the Parties
- Appointing authority (to nominate DAAB members if Parties unable to agree) to be an international organisation.

In parallel, the mechanism for handling alleged non-compliance with GBV-related obligations was developed and refined after discussions worldwide with governments, employers, and contractors' organisations.

On 25 November 2020, the Bank issued a press release announcing the new mechanism which will be put into operation from 01 January 2021, available at: <https://www.worldbank.org/en/news/press-release/2020/11/24/contractor-disqualification-to-strengthen-prevention-of-gender-based-violence>.

A special set of SPD has been prepared for use on projects for which the risk of GBV is assessed to be high. More specifically, for such projects, the Contract will impose obligations on the Employer and the Contractor to prevent, monitor and handle incidents of sexual exploitation and abuse and sexual harassment (SEA/SH). In the event of an allegation, the Employer must refer the matter to the DAAB for a decision on whether the Contractor had failed to comply with its obligations. The DAAB will be given no details of the allegation, nor will it be required or empowered to investigate the allegation.

More details of the obligations and of the DAAB role on such projects, can be found in the Guidance Note produced jointly by the Bank and DRBF which can be downloaded from the DRBF website on the Strategic Partnerships page found under the About Us tab, or at: <https://bit.ly/3mZSnbr>.

The Bank hopes that other Multilateral Development Banks will follow its example.

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The *Forum* welcomes articles on all aspects of Dispute Resolution Boards, and members are encouraged to submit articles or topics to the Editor.

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Dispute Resolution
Board Foundation

DRBF selected to support FIDIC’s newly established certification body, FIDIC Credentialing Limited, with the launch of adjudicators’ expansion programme

This Press Release was issued on 4 December 2020 and is available on the DRBF website.

The Dispute Resolution Board Foundation (DRBF) is pleased to announce the signing of an agreement with the certification body FIDIC Credentialing Limited (FCL) to support FCL’s adjudicators’ programme. The goal is to significantly increase the number of skilled and experienced dispute adjudicators providing dispute resolution and/or avoidance services under FIDIC Contracts.

“Both FIDIC and the DRBF anticipate an increase in demand for skilled Dispute Avoidance and Adjudication Board members worldwide,” said Andrew Griffiths, DRBF Executive Board President. “The DRBF is committed to providing all the assistance it can to the FCL to assure that the President’s List’s reputation for excellence is maintained through the expansion programme.”

Under the terms of the memorandum of agreement, the DRBF will nominate Dispute Board experts to sit on the new FCL’s writing and examination committees for new adjudicator assessments programme and provide a continuing professional development training programme for the approved adjudicators on the FIDIC President’s List. The first programs will begin in early 2021.

“We are very hopeful that this will create many more opportunities for a much broader Dispute Board constituency, and we very much look forward to working with FIDIC over the months and years to come,” said Griffiths. “On behalf of DRBF, my thanks go to DRBF leaders, notably James Perry, Leo Grutters and

Peter Collie, for this achievement.”

About the Dispute Resolution Board Foundation (DRBF)

The Dispute Resolution Board Foundation (DRBF) is a non-profit organisation dedicated to promoting the avoidance and resolution of disputes worldwide using the unique and proven Dispute Board method. The DRBF provides assistance with the worldwide application of the Dispute Board method by providing training, advice and suggestions tailored for the conditions and practices existing in project areas. See www.drb.org.

About FIDIC

FIDIC, the International Federation of Consulting Engineers, is the global representative body for national associations of consulting engineers and represents over one million engineering professionals and 40,000 firms in more than 100 countries worldwide. The buildings and infrastructure sector in which FIDIC members work contributes around US\$36 trillion to global GDP.

FIDIC has ongoing agreements with the following multilateral development banks to use the FIDIC suite of Contracts (2017 and 1997 editions) – Asian Infrastructure Investment Bank, African Development Bank, Islamic Development Bank, European Bank for Reconstruction and Development, World Bank, Inter-American Development Bank and the Caribbean Development Bank. See www.fidic.org.

About FCL

FIDIC Credentialing Ltd (FCL) was established in Geneva, Switzerland by FIDIC as an independent body to offer certification and professional development services to various professionals and infrastructure industry experts wishing to broaden their scope of knowledge and expertise.

DRBF EVENTS IN 2021

The DRBF is planning a full slate of online programming in 2021 and, we hope, some in-person events as it becomes safe to do so. Visit the DRBF events calendar regularly at www.drb.org for the latest announcements and registration details about webinars, training, conferences and meetings.

Mark your calendar for these can't-miss events:

DRBF Administration & Practice Workshops: Our signature introductory courses on DB implementation will be offered in two sessions in February:

11 & 12 February focused on DABs and DAABs (DRBF Region 2/international and multinational practice with binding decisions)

25 & 26 February focused on DRBs (DRBF Region 1/US and Canada practice with non-binding recommendations)

DRBF Central & Eastern European Conference: This annual conference brings together experts on DB practice throughout Europe to share best practices and share experiences, on 11 & 12 March.

DRBF International Conference: The DRBF's signature annual conference returns 19 - 21 May with inspiring speakers and educational programming for DB users and practitioners working globally, with a special emphasis on opportunities in Portugal.

To watch a previous webinar or informational session, visit the DRBF's YouTube channel and subscribe: <http://bit.ly/37r2TE9>



Put Away the Shredder! Can Dispute Boards Help with PPP Renegotiations?

By Mark M. Moseley

Principal,
Moseley
Infrastructure
Advisory
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On 11 November 2020, I gave a presentation at a webinar organised by the UK members of the DRBF, along with two other members of the DBRF Region 2 Public-Private Partnership (PPP) Task Force, namely Serge Bodart (the Region 2 PPP Task Force Chair) and Lindy Patterson, QC. Our topic concerned the benefits of, and questions arising from, the use of Dispute Resolution Boards on PPP transactions. In part, my presentation dealt with a paper which the Asian Development Bank (ADB) had recently asked me to prepare on creating ‘more collaborative’ PPPs (available at <https://www.adb.org/publications/restoring-confidence-public-private-partnerships>), in which I recommended the use of DRBs in PPP transactions, as a mechanism for fostering a greater sense of partnership between the public and private parties to PPP contracts. During the breakfast webinar, I floated an additional argument for using Dispute Resolution Boards on PPP projects. The argument is that DRBs might well help to address a major area of concern with PPPs, namely the phenomenon of PPP renegotiations.

THE CHALLENGE OF PPP RENEGOTIATIONS

By definition, a renegotiation involves rewriting the terms of a PPP contract – as opposed to a mere change which takes place in accordance with an adjustment mechanism specified in the PPP agreement. As I indicated in another presentation I recently gave to the ADB (available at <https://events.development.asia/learning-events/ppp-renegotiation-best-practices>), such renegotiations happen with surprising frequency. According to the latest data from the G20’s Global Infra-

structure Hub, somewhere between one-third and one-half of all PPP contracts are renegotiated at some point during the lifetime of the agreement. The frequency of such renegotiations reflects the fact that PPP contracts are long-term and very complex, and that they often lack the flexibility to respond to unanticipated developments (such as a global pandemic). In any event, renegotiations can present significant problems – particularly for the government party in a PPP transaction – because of the difficulties which government authorities have in ensuring that a renegotiation complies with national procurement policies. Specifically, the government will want to make sure that the renegotiated contract still meets the test of achieving ‘value for money’. When a PPP contract is initially awarded, there is, normally, a competitive bidding process, such that the government can be confident that it has achieved good value. However, in a renegotiation, there is no such ‘competitive tension’ – the only parties at the table are the government and the incumbent private sector company.

DISPUTE BOARDS AND PPP RENEGOTIATIONS

Why are Dispute Boards relevant to the topic of PPP renegotiations? It is because of the way in which DBs function. Specifically, because of the familiarity with the project which DB panel members gain during their periodic site visits, and because of the trust relationship with the contracting parties established during those visits, a DB can be well-positioned to help the contracting parties deal with incipient problems – before those problems trigger a full-blown contractual renegotiation. In other words, just as a

skilled DB panel can facilitate the avoidance of formal disputes, it can similarly facilitate the avoidance of renegotiation requests. According to the GI Hub data (see Chapter 4 of the report on Managing PPP Contracts After Financial Close, available at <https://managingppp.gihub.org/>), a significant number of renegotiation requests arise as a result of a private party encountering unanticipated increases in construction costs and/or a government party changing its policies, particularly in respect of the fees or tariffs to be paid by end-users of the infrastructure facility. Arguably, a DB panel with the right skillsets may be able to foresee serious problems arising from a project company’s handling of the construction phase and/or a proposed government policy change, and the DB could then advise the parties, at an early stage, of the need to take corrective steps so as to avoid a future renegotiation.

In addition, if a renegotiation does become inescapable, the DB may, conceivably, be able to provide some comfort – especially to the government party – that the new contract is fair and reasonable, and that it still constitutes ‘value for money’. If they were given the authority to do so, the DB members – who would be knowledgeable about the project –

could perform a function similar to that of the so-called “Technical Panel” created by the 2010 Concession Law in Chile, which is responsible for verifying that certain statutory conditions have been met before any proposed renegotiation is approved in that country.

PUTTING AWAY THE SHREDDER

In short, carefully crafted Dispute Board provisions in PPP contracts could help to address some of the major concerns with PPP renegotiations. We may even be able to ‘put away the shredder’ and reduce the number of times we need to rewrite Public-Private Partnership agreements.

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Staying Straight in your Boots

A common requirement for Dispute Board appointment in many parts of the world is to have “international experience.” What is meant by this requirement, why is it required, and what kind of experience would satisfy it?

At a first glance, the most obvious meaning or interpretation would be experience abroad, in country(ies) other than the home country of the candidate. It raises the question about why this is needed, and why working in the home country, at least in certain conditions, is not sufficient?

In the preparation of numerous tender/bidding dossiers where that requirement was included for various experts to be appointed, it was noted that, especially for long-term experts, contracting authorities needed to ensure the selected experts would be able to cope with the stress of being away from home and family and to work in a different environment with different cultures.

Fair enough. Let’s keep that in mind and analyse it!

To fulfil the requirement of “international experience” from that point of view, experience abroad, in any kind of project or in any other position, should be just as relevant. Let alone the fact that a Dispute Board member is not expected to go abroad and stay there for long periods.

As well, even if working in positions other than that of Dispute Board Member, an expert that has worked abroad is highly likely to have been exposed to different cultures and thus, is prepared to understand that different cultures do exist, that various aspects need to be understood and done differently than in one’s home country.

Another justification might be the fact that an expert with “international experience” has met different situations, in different places and, might bring an added value as they might bring a wider point of view on approaches to be adopted for dealing with various situations, thus providing a capitalised knowledge.

Also, fair enough, let’s keep that in mind and look at it too.

In general, an expert arriving at the professional level of being appointed as a Dispute Board member is expected to have worked, even if in his home country, in international contracts financed by International Financing Institutions, governed by internationally recognised Conditions of Contract (e.g. FIDIC), with international contractors and engineers and hence, to have achieved a considerable level of expertise and knowledge in working with people originating from different countries and cultures, having different manners and methods to handle various aspects.

Hence, given that certain conditions have been met, i.e. the expert has worked abroad (even in different positions), has worked in the home country in international contracts and, of course, has reached the required degree of experience and knowledge, it is the author’s opinion that there should be no reason not to consider that as sufficient “international experience” relevant for appointment as a Dispute Board member.

In addition, let’s look now deeper into the case of an expert from (of course, hypothetical) country where the market is very limited, only local language is used and moreover, everybody knows everybody. A Dispute Board candidate may shortly arrive at an awkward position



By Florin
Niculescu

DRBF Member -
Romania

where representatives of at least one party are known by the candidate. That will obviously lead to an artificial pressure that, in general, is not met when working abroad, or in very large countries.

Moreover, as the market is also limited in terms of Employers generating that type of work, an expert might end up with giving a number of decisions, unfavourable or partially unfavourable, precisely to a primary Employer in their home country.

And, to make the situation worse, let's imagine that politically entangled participants are intervening, sending more or less discreet messages to the expert, indicating during the adjudication process in various ways, from "friendly hints" to direct threats, that selection of the said expert for other Dispute Boards "may" be dependent on the "righteousness" of the decision to be issued.

And, the cherry on the cake, when such parties receive unfavourable decisions, without even trying to understand the provided reasoning and looking critically at their own performance, automatically blame the Dispute Board member (claiming bis, that their arguments were not duly considered, etc.) say the member is now blacklisted - regardless of how many proposals for his appointment are later issued by the other parties, that expert will be banned from future appointments.

In front of such a situation, the available experts in such limited local markets will shortly come to face a great dilemma: staying "untouchable", or become somewhat sensitive to such factors and give priority to the "food on the plate".

For avoidance of doubt, of course, this

is nothing but a hypothetical situation, solely analysed for the purpose of this article. Also for avoidance of doubt, the author does not imply in any way that Employers are always receiving or should receive unfavourable decisions.

Therefore, given the above considerations and, providing that the above detailed level of experience and knowledge is met, it is the author's opinion that an expert working in his own country will most likely face far more difficult conditions. Hence, their expertise should be considered when candidacy is being assessed.

Moreover, accepting that type of expertise would constitute an incentive for said experts to stay straight in their boots by refusing to make compromises and indeed, to keep up the principles of fairness and impartiality and the common sense in dispute resolution, values that the DRBF and many other international organisations are promoting.

CONCLUSION

Providing an expert who has worked abroad in any capacity (and therefore is used to travelling, working with different cultures and coping with extended periods away from home to complement experience with international contracts) should be sufficient to satisfy "international experience" requirements when assessed during an accreditation of appointment process. Thus, experience as a Dispute Board member in one's own country should be not only just as relevant as experience abroad, but sometimes, probably even more.

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Author's Note: Any remote resemblance with real life or cases met anywhere in the world is absolutely accidental and author of this article ensures the readers that described (unlikely) scenaria are of course, nothing more than a literary exercise.

A First: DRBF Connections Conference Online Event Brings Global Audience Together for Three Days of Informative Content

The DRBF held its *first-ever online* conference, DRBF Connections 2020, in October. About 170 delegates from over 30 countries attended - in that way, it was much like the DRBF's Annual International Conference traditionally held in-person. Over three days, delegates enjoyed a half-day advanced master class on "Techniques for Better Decision Writing," followed by two half-days of lively panel discussions and presentations.

A perhaps unexpected bonus was that participants were able to chat in real-time with speakers, presenters and each other during each session, and to network "face-to-face" via special Zoom rooms before and after the conference sessions.

In post-event feedback, delegates praised the organized and informative sessions which covered a broad range of topics. One delegate wrote, "Honestly, I stuck to my computer all the time." Another said, "It was

a wonderful experience; I wish we would have one every month!"

Delegates also provided excellent suggestions for future conference topics, from an additional workshops or sessions on writing skills, case studies on "tricky" situations, and insight on disbanding a DB. They also asked for more online/virtual networking in 2021—and more online conferences like this.

"The DRBF received high praise for the conference program, the content, quality of speakers and presentations," said Andy Griffiths, who served as conference chair. "While we look forward to seeing everyone again in person, it was great to create that human connection through the virtual platform."

MASTERCLASS IN WRITING TECHNIQUES

Seven experts packed the three and a half hour masterclass with real-life,



relevant and detailed information on writing techniques.

Covering common writing pitfalls - with real DB case studies - was presented by Julie S. Schrage. Patricia Galloway provided unique insight into writing a DB opinion from the perspective of a prior expert witness, arbitrator and DB Member.

A panel discussed how DB users evaluate the DB's writings. Common oversights, mistakes and good practices were topics covered by Deborah Mastin, Kenneth M. Roberts, Esq., and James E. Moyer.

What happens when the DB's recommendation or decision escalates to arbitration was the topic explored by Ken Roberts and Rod Toben of the American Arbitration Association.

CONFERENCE DAY 1

DRBF Executive Board President Andrew Griffiths opened the official conference by introducing not one, but two keynote speakers to discuss the highs and lows of the largest fixed-cost US construction project in history, the Tappan Zee Bridge in New York. These speakers were Peter Kiernan, Chair of the New York State Law Revision Commission and former special counselor to New York Governor Andrew Cuomo on Infrastructure Initiatives, along with Garry W. Flowers, executive vice president for Construction, HSE & Risk with Fluor.

The day's first session was on the topic of dispute avoidance. Speakers

Robert Fenwick Elliott and John Papworth covered techniques to create a dispute avoidance mindset; how to assist the parties to avoid time consuming disputes using focused advisory opinions; and lessons learned from structured interventions to help avoid crucial delay and cost issues.

Another panel of experts discussed the hot topic of enforcement of DB decisions. Speakers included Jeremy Glover, David Brown, Júlio César Bueno and Yasemin Cetinel.

Discussing the on-going debate in the U.S. of the admissibility of non-binding recommendations for projects that proceed to binding resolution were panelists Ken Roberts, Kurt Dettman, Lindy Patterson and Bruce Mellor.

Marianne Ramey and Michael Saulsbury discussed extension of time claims, giving practical guidance related to preparing schedules, delay and disruption analysis, and related topics.

CONFERENCE DAY 2

The final conference day began with DRBF Executive Board president-elect Nicholas Gould. He introduced the keynote presenter Sir Robert Akenhead, International Arbitrator and former Judge of the UK High Court, who spoke on dispute resolution in a Covid-19 world.

Moving to cross-cultural challenges, a panel then covered topics related to the impact of globalization on US



contractors. Providing insights from real-life experiences were Charlie Kilpatrick, Hugo Fontirroig, Mike Vitale, Mike Roach, Paul Battrick and James Marquardt.

Continuing with the multi-cultural theme, the next panel covered the challenges of navigating multinational projects given the diverse line-up of professionals on projects. Panelists were Jerry Brodsky, Henry Musonda, David Kassebaum and Song Dongsheng.

For those wondering if virtual Dispute Boards are here to stay, experienced panelists offered their insights. Nicholas Gould, Leo Grutters, Roberto Hernandez, Joe Gildner and Paul Carter discussed the pros and cons of virtual DBs, concluding that some aspects of virtual or online activities are here to stay - others will, thankfully, not continue once in-person meetings resume fully.

The DRBF thanks speakers and attendees for making this inaugural online event such a success.

The DRBF also thanks our sponsors for helping us to bring together these educational and networking events.

Platinum:

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Gold:

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C2S Global International
Construction Contract Services
McDonough Bolyard
Peckar & Abramson**

Bronze:

**PDS
Hanscomb International
Trayor Bros., Inc.**





If you missed

**DRBF Connections
Conference 2020**

you can still register to view
the recorded sessions on-demand.
Access includes all features, such as
papers and presentations for download,
as well as the recordings and transcripts.

View the DRBF website for
[more information.](#)

Registration fees for on-demand:

DRBF Member - US \$100

Non-Member - US \$125

Click to Register [Here.](#)



AI Mathews Award for Dispute Board Excellence 2020 Recipient

Kurt L. Dettman

Each year, the Dispute Resolution Board Foundation presents the prestigious AI Mathews Award to a DRBF member who has given exemplary service in advancing the use of the Dispute Board concepts and the DRBF. Congratulations go to the recipient for 2020, Kurt L. Dettman. The award is usually presented at the DRBF Annual Meeting & International Conference, which was held online this year. The Executive Board will present the award to Kurt at the next in-person annual meeting and conference.

Kurt Dettman draws upon over 37 years of legal and public management experience to facilitate dispute avoidance and dispute resolution in the construction industry. He focuses on open communication and consensus-building among contractors, owners, attorneys and consultants. Kurt's current consulting practice focuses on the use of all forms of dispute avoidance and resolution in the construction industry, including dispute resolution systems design, partnering, settlement negotiations, mediation, arbitration, and Dispute Review Boards. He also provides advice in dispute systems design and implementation for alternative project delivery approaches, including design-build, integrated project delivery, and public private partnerships.

Kurt has been involved in the DRBF since 2006, serving as:

- Past-President, DRBF Executive Board of Directors (2019-2020)
- President, DRBF Executive Board of Directors (2018-2019)
- Chair, DRBF PPP Task Force (2019-present)
- Co-Chair of the Region 1 Transit Committee (2020-present)
- President Region 1 (U.S. and Canada) (2014-2015)
- Chair of the DRBF Training Committee (2015-2018)
- Region 1 Director of Training and Co-Chair of Training Committee (2012-2018)
- Co-Chair of the DRBF P3 Task Force and Chair of the Region 1 P3 Task Force (2015-2018)
- Co-Chair of the Region 1 Transportation Committee (2016-2018)
- Co-Chair of the ConsensusDOCs Working Group for DRB Addendum (2014-2015)

Kurt has written numerous articles for the DRBF *Forum* and other professional journals, and has presented at industry professional conferences on DRB best practices. Kurt's DRB "best practices" experience culminated in him being the DRBF Lead Reviewer for Region 1 for production of the DRBF's *Dispute Board Manual* published in 2019.

Kurt has and continues to be an important contributor to the advancement and success of the DRBF as the pre-eminent authority on the use of Dispute Boards worldwide.



DRBF Publications and Papers Program

The DRBF publishes this journal, the *Forum*, on a quarterly basis for members and supporters, and maintains a robust online library of articles, videos, presentations, and other educational materials on the Dispute Board process.

Beginning in early 2021, the DRBF will offer the DRBF Papers program, regularly publishing high quality reference papers on focused dispute topics of interest to our community. This program will provide useful resources to DB users and practitioners, and provide a platform for members to share their experiences and expertise in a longer format than available in the *Forum*. Visit the [DRBF Papers Program](#) page on the DRBF website for more details, including submission guidelines.

**Have news or an article idea
for the next issue of the Forum?**

Contact Ann Russo at
arusso@drb.org.

**Deadline for the next issue:
15 February 2021**

The Development of the Dispute Boards in Costa Rica

By Christian Díaz
and Silvia Trejos

It is estimated that every year, over 200 construction projects from all around the world commence with a Dispute Board (DB), and it is well known that many multilateral development banks heartily recommend their use for construction projects. DBs are normally not regulated by a Law or any legislative act. Costa Rica is not the exception.

DBs are rarely regulated by legislation, and in Costa Rica, they are recognized as a contractual obligation. Current legislation in Costa Rica gives ample space for alternative dispute resolution methods. Article 43 of the Constitution and the Alternate Conflict Resolution and the Promotion of Social Peace Law (“Law 7727”) guarantees the right to resolve any disputes or conflicts by means of alternative methods. Therefore, we can consider DBs as a dispute resolution mechanism accepted by the Costa Rican legal system, not explicitly, but implicitly.

Among others, there are two general types of DBs in use in Costa Rica: Dispute Adjudication Boards (DABs) and Dispute Review Boards (DRBs). The key difference between them is that DABs issue decisions that must be complied with immediately and are contractually binding. On the other hand, DRBs issue recommendations.

The legal nature of decisions issued by a DAB is that they are contractually final and binding for the parties (Article 1022 of the Civil Code: “pacta sunt servanda”). However, if not enforced, a party can escalate the dispute to another dispute resolution forum, i.e., arbitration or litigation.

Despite the Costa Rica case law, the DB

is an adjudicative mechanism and not simply a space through which the parties can voluntarily communicate to reach an agreement. If the parties contractually agree, the establishment of a DB is mandatory.

Currently, there are not many DBs in Costa Rica. Those that exist are mainly under the construction of national roads. The Costa Rican Congress is discussing a new bill, “General Law on Public Procurement”. Once this law is approved, the “tool” of Dispute Boards will be incorporated in public contracting with an emphasis on public works projects. This would make mandatory the integration of a DB for any disagreements and disputes, which we expect would make Costa Rican public infrastructure more efficient.

In anticipation of the growing use of DBs in Costa Rica, there have been several training workshops delivered recently by the DRBF on behalf of local associations. In addition, DRBF members frequently speak about Dispute Boards as a popular topic for legal and construction conferences in the country and throughout the region.

In the near future, Dispute Boards will become a key tool for construction companies and government agencies to improve the use of public finances for better infrastructure development. We, the users, must keep an eye on the usage of this tool in order to give our clients better legal and technical support thru the construction process.

Christian Díaz is DRBF Representative for Costa Rica. He can be reached at christian.diaz@garciabodan.com.

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A conversation with... **Doug Holen**



Doug Holen

**Past President
of the DRBF
Executive Board of
Directors, 2015-16**

**Al Mathews
Award for Dispute
Board Excellence
Recipient, 2017**

Doug Holen has an impressive career as a professional engineer spanning 50 years, and earned the DRBF’s highest honor, the Al Mathews Award for Dispute Board Excellence, in 2018. He is the former Director of Capital Projects–South at the University of Washington in Seattle, Wash., U.S., and also served as the Governor’s appointee, advising the Governor and Legislature on alternative Public Works contract matters. He currently serves as a consultant to several public owners utilizing alternative public works procurement processes (GC/CM, CMAR, Design-Build) and is the chair or member of Dispute Resolution Boards for building, transportation and heavy construction projects in California and Washington State. For the DRBF, Doug has served in several leadership positions: President of Region 1 (US and Canada) Board of Directors and President of the Executive Board, and serving on many committees, most recently steering the development of the DRBF’s Policy and Administrative Procedures Handbook.

What are the most important roles for the DRBF/DBs in the current (Covid) climate?

Continue to do what you have been doing...i.e., providing virtual training on best practices using video conferencing systems, pointers for holding hearings virtually, and conducting conferences virtually.

How and when did you get your first DB appointment?

A colleague in another agency called when he knew I had retired and asked if I would serve on one of his DRBs. I applied and the contractor concurred.

What advice would you give to younger members keen to obtain their first DB appointment?

Attend DRBF functions, network and take part in the proceedings if there is a role for you. Apply for any DRB rosters and attend the training in locales where you would like to serve.

You have been on the owner side and the DB Practitioner side. What advice do you have for rising professionals within the owner organizations who may be using or considering the use of DRBs?

If you are using DBs, stay the course. You won’t always win, but the outcome is much better than the alternative—for your organization and staff. Ensure that your entire construction management team has an opportunity to attend DB training and take part in some of the meetings, if possible. If you are considering using DBs, do it. The alternative is a very expensive and time-consuming train wreck at the end of the job that adds no value to the project. With a DRB, you have an opportunity to resolve issues as they develop, expending the project team’s time on efforts to keep the train on the track rather than in preparing for the train wreck at the end.

What is the most difficult situation you have ever had to deal with on a DB?

The introduction of a “legal theory” during a hearing that had not been included in any of the pre-hearing documents.

What is the most satisfying DB you have served on and why?

There have been several where the Board has assisted the parties in resolving an

issue in informal discussions, either during the course of a regular meeting or in an informal hearing.

Should the DRBF recommend maximum and/or minimum age limits for DB members?

No. I think it would marginalize some of our best practitioners.

How many DBs can a member properly serve on at any one time?

I think that depends on the meeting frequency and the travel involved.

How do you keep fit and healthy and what is your preferred relaxation away from DBs?

Golf, biking, walking and hiking, fly fishing, and travel

Outside your own country, where would you most like to live and why?

My wife and I have always enjoyed our trips to France... Maybe there... Great food and wine!

Doug Holen can be reached at holendouglas@gmail.com.

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COVID-19 Update

As we end a year challenged by the COVID-19 pandemic, the DRBF remains committed to supporting our community and the continuation of Dispute Board operations and implementation. Now more than ever, projects need efficient and effective dispute avoidance and resolution that is the hallmark of the Dispute Board process.

In 2020 the DRBF published several articles to help members maintain DB procedures while staying safe. We encourage you to download the articles listed below and view the webinars and session recordings from the DRBF Connections Conference. Look for more as we continue to evolve in 2021!

- ➔ **Best Practice Guidelines for Virtual Dispute Board Proceedings**
- ➔ **Checklist for Dispute Board Members in Preparation for Virtual Dispute Board Proceedings**
- ➔ **New in the DRBF library by DRBF member Roberto Hernández-García: Why Dispute Boards are an Excellent Dispute Resolution Tool During the Covid-19 Crisis**

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DRBF Membership 2021

The DRBF's membership renewal campaign is underway, and we are actively recruiting new members to join our association.

Do you know someone who would like to join the DRBF?

Help us expand by sharing information with your colleagues. Complete membership information about individual and organization membership can be found on the DRBF website www.drb.org under the "Membership" tab, or contact the DRBF at info@drb.org.

WELCOME

to the new DRBF Website

The screenshot shows the DRBF website homepage. At the top, there is a search bar with the text "Search our site..." and a "Search" button. Below the search bar is the DRBF logo, which features a globe and the text "The Dispute Resolution Board Foundation" and "DRBF" with the tagline "Fostering Common Sense Dispute Resolution Worldwide". To the right of the logo is a "Member Login" button with a lock icon. Below the logo and search bar is a navigation menu with the following items: Home, About Us, Membership, Events Calendar, Publications, Training, and Awards. The main content area features a large graphic with the text "Renew Your MEMBERSHIP" in a blue box. To the left of this graphic is an illustration of a group of people. Below the graphic, there is a "Quick Links" section with the following items: JOIN NOW - Individual, JOIN NOW - Organization, RENEW Your Membership, Dispute Board Manual, Member Directory Search, and Contact Us. Below the "Quick Links" section is a "Latest News" section with a thumbnail for "DRBF Connections Conference 2020" held from 28-30 October, starting at 14:00 UTC.

Welcome to the new DRBF website. We are excited to introduce a fresh and user focused platform for our members!

You are encouraged to tour highlights of the new website by watching our webinar recording: <https://youtu.be/UVekDFp6mgs>

Need help? Reach out to DRBF staff members Nichole nthompson@drb.org or Kimberly kpeterson@drb.org.



Announcing the New DRBF Representative for United Kingdom: Julie Forsyth

Julie Forsyth is an English solicitor, an arbitrator and an adjudicator. Her practice focuses on the construction, engineering and energy sectors. In her role as counsel, she has worked with dispute boards on a variety of projects and is a strong advocate of their use.

In the UK, Julie is a partner at Gunnercooke LLP and acts as solicitor for a variety of construction-related clients, and for banks providing development funding. She was previously a partner at Berrymans Lace Mawer and trained in the 1980s with Freedmans. With over 30 years as a specialist construction lawyer, Julie has negotiated contract documentation and represented clients and their insurers on disputes relating to a vast array of projects including bridges and highways, dams, tunnels, airports, hotels, ports and pipelines in Europe (including the UK), Africa and the Middle East.

Julie is a qualified arbitrator and has been a Fellow of the Chartered Institute of Arbitrators for 24 years. She is also an Alternative Dispute Resolution Official at the Centre for Effective Dispute Resolution (CEDR) in London. She is Honorary Secretary of the Society of Construction Arbitrators.

Julie replaces John Papworth, who served in the role for many years and passes on a vibrant membership group and team of organizers working collaboratively with Julie in her new role.

Julie can be reached at: julie.forsyth@gunnercooke.com

To find a Country Representative in your area, visit the leadership page under the “About Us” tab on our website or [click here](#).

Interested in becoming a Country Representative? Send an email to Svetlana Borisova at: sborisova@drb.org to get started.

Announcing the New DRBF Representative for Ireland: Gerard P. Monaghan



Gerard P. Monaghan BEng, MSC, MBA, CEng, FCIArb is a Chartered Engineer with over 28 years in the commercial management and delivery of utility and infrastructure projects in Ireland and internationally. He is experienced as advocate/representative/expert for a variety of construction disputes under various civil engineering and building contracts and model contract forms. His dispute resolution experience also includes various appointments as Conciliator under Clause 13 of the PWC contracts, Standing Conciliator under the revised Clause 13 Public Works 2016 suite of contracts, and FIDIC DAB/DAAB experience. Since 2010 appointed as sole arbitrator for a series of consumer disputes with the publication of reasoned awards.

Gerard has been an active member of the DRBF and we look forward to his leadership in promoting Dispute Boards and supporting the DRBF membership in Ireland.

Gerard can be reached at gmonaghan@nodwyer.com

DRBF Forum

Dispute Resolution Board Foundation

3440 Toringdon Way, Suite 205

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2020

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